Supreme Court, U.S.
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Docket No. 07-351

THE SUPREME COURT OF THE UNITED STATES

Billy R. Delp, Jr.,

Petitioner,

v.

Nu-Way Energy Corporation,

Respondent.

On Petition for Certiorari to the Tenth District Court of Appeals of Texas at Waco

PETITION FOR WRIT OF CERTIORARI

Mack Ed Swindle
Counsel of Record
Thomas F. Harkins, Jr.
WHITAKER CHALK, SWINDLE & SAWYER, L.L.P.
3500 D.R. Horton Tower
301 Commerce Street
Fort Worth, Texas 76102-4186
Phone: (817) 878-0500

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. As a Chapter 11 bankruptcy Debtor, Petitioner Delp listed his Individual Retirement Account ("IRA"), under 26 U.S.C. § 408(a), as exempt in his Schedule C. No one objected. Respondent Nu-Way, a Creditor, had a *prepetition* debt subsequently declared nondischargeable. If Delp engaged in a "Prohibited Transaction" with his IRA, under 26 U.S.C. § 4975(c), *after* filing his Schedule C, can Creditor now collect against the IRA?

2. Creditor Harvison, Nu-Way principal and privy, had his Plan confirmed in Delp's Chapter 11. Plan ¶ 4.10 provided: "The Debtor . . . shall be entitled to retain . . . personal property scheduled as exempt under Schedule C of the Debtor's Schedules." Delp's IRA was scheduled. Plan ¶ 9.03 provided: "[T]he provisions of Harvison's Plan shall bind the Debtor and any Creditor." Nu-Way participated extensively in the Chapter 11 and received favorable terms under the Plan. Years later it obtained a nondischargeable judgment against Delp on its prepetition debt. Do the Plan terms bar Nu-Way from collecting on that judgment against the Plan-exempted IRA?

3. If Delp engaged in a Prohibited Transaction with his IRA prior to confirmation of Creditor Harvison's Plan (which allowed Delp to retain his IRA), does *res judicata*, waiver, or release bar Creditor Nu-Way from claiming it can now collect against the IRA, regardless of whether its prepetition debt is nondischargeable?

4. The Trial Court held Nu-Way was not entitled to offset Delp's fee award against Nu-Way's nondischargeable debt. This was because Nu-Way had wrongfully depleted an asset it had allowed Delp to retain in the Plan, his IRA, through this violative litigation. Was the Waco Court of Appeals' reversal of that holding proper?

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CITATIONS OF OPINIONS AND ORDERS

1. Trial Court:

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2. Intermediate Appellate Court:

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3. Texas Supreme Court:

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Id., 2007 Tex. LEXIS 391 (Tex. April 27, 2007)
(Motion for Rehearing Denied) (unpublished)–App 32-33.

BASIS OF JURISDICTION

(i) Date: Judgment to be Reviewed–September 6, 2006.

(ii) Date: Denial of Petition for Review–February 2, 2007.

(iii) Date: Denial of Rehearing–April 27, 2007.

(iv) Statute Conferring Jurisdiction–28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Although the judgment sought to be reviewed remanded the case, this was for the sole purpose of allowing the Trial Court to reconsider its award of discretionary attorneys' fees. App 2, 25. An appellate judgment is considered final if only an assessment of attorneys' fees remains to be considered on remand. *Davis v. Baker*, 29 S.W.2d 921, 924 (Tex. App.–Austin 2000, no pet.).

28 U.S.C. § 1257(a) confers jurisdiction because the decision of the Texas State court violates rights conferred on Petitioner Delp under 11 U.S.C. § 522(b)(1), (3)(A) & (C); (c); & (*l*). Delp's Schedule C claimed exemption for his IRA. "Unless a party in interest objects, the property claimed as exempt on such list is exempt." 11 U.S.C. § 522(*l*). No one objected. "[P]roperty exempted under this section [11 U.S.C. § 522] is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case." 11 U.S.C. § 522(c) (exceptions inapplicable). Respondent's claim is for a pre-bankruptcy debt, yet the Texas court ordered turnover of the IRA to satisfy it.

This Court should exercise its jurisdiction under Supreme Court Rule 10(c) because the State court has decided an important question of federal law–whether property exempted in bankruptcy may be executed on by a nondischargeable creditor. The opinion conflicts with *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), which distinguishes between a right to collect on a debt and a right against property, and with *American Surety Co. of New York v. Sampsell*, 327 U.S. 269, 272 (1946) (federal bankruptcy law governs the distribution of a bankrupt's assets).

Also, under 11 U.S.C. § 1141(a), "the provisions of a confirmed plan bind . . . any creditor." The Waco State Court judgment "unbinds" Creditor Nu-Way from Plan ¶ 4.10, which says: "The Debtor . . . shall be entitled to retain . . . [his] personal property scheduled as exempt under Schedule C." This IRA property was so scheduled. Therefore, this issue is within 28 U.S.C. § 1257(a) because the decision of the Texas State court violates rights conferred on Petitioner Delp under § 1141.

The Court should take the case under Rule 10(c) because the State court has wrongly decided an important federal question which should be settled by this Court. *United States v. Energy Resources Co, Inc.*, 495 U.S. 545 (1990), allows a bankruptcy plan to affect rights of a nondischargeable creditor. Further, *Prudence Realization Corp. v. Ferris*, 323 U.S. 650, 654 (1945), enforces a bankruptcy "arrangement [that] was the product of bargaining between the parties." Nondischargeable creditors should be held bound to plan provisions they themselves draft.

Further, orders confirming plans are *res judicata*, binding creditors under 11 U.S.C. § 1141. The Waco judgment violates Delp's federal rights by overriding confirmation of the plan term that Delp could retain his IRA. The State opinion is thereby inconsistent with *Prudence Realization Corp. v. Ferris*, 323 U.S. 650, 654-55 (1945) (order confirming plan of reorganization is *res judicata*), and *Heiser v. Woodruff*, 327 U.S. 726, 735 (1946) (judgment is *res judicata* if an issue *could* have been raised).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 522(b)(1), (3)(A) &(C); (c) & (*l*):

> (b)(1): Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (:) of this subsection. . . .
>
> (b)(3)(A) & (C): Property listed in this paragraph is–
>
> (A) subject to subsections (*o*) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 730 days immediatey preceding the date of the filing of the petition . . ..
>
> (C) retirement funds to the extent that those funds are in a fund or accountthat is exempt from taxation under section 401, 403, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.
>
> (c): Unless the case is dismissed, property exempted under this section is notliable during or after the case for any debt of the debtor that arose . . . before the commencement of the case, except–[not applicable].
>
> (*l*): The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. . . . Unless a party in interest objects, the property claimed as exempt on such list is exempt.

11 U.S.C. § 1123(a)(5)(A) & (b)(1):

> (a) Notwithstanding any otherwise applicable non-bankruptcy law, a plan shall– . . . (5) provide adequate means for the plan's implementation, such as–
> (A) retention by the debtor of all or any part of the property of the estate.
>
> (b) Subject to subsection (a) of this section, a plan may–
> (1) impair . . . any class of claims . . ..

11 U.S.C. § 1141(a) and (d)(2) & (3):

> (a) Except as provided in subsections (d)(2) and (3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.
>
> (d)(2) A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title.
>
> (d)(3) The confirmation of a plan does not discharge a debtor if– (A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan; and (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

STATEMENT OF THE CASE

The Texas Court of Appeals ("Waco court") issued a Judgment (App 1-2) and Opinion (App 2-32) reversing an Amended Final Judgment ("judgment") (App 34-40) of the District Court ("trial court"). It limited remand to attorneys' fees. App 2, 25. The trial court judgment was supported with a 31-page Amended Findings of Fact & Conclusions of Law ("findings" and "conclusions") (App 40-76). A Petition for Review was denied by the Texas Supreme Court on February 2, 2007. App 32-33. Rehearing was denied on April 27, 2007. App 32-33. A Petition was timely filed within 90 days thereafter under Rule 13(1).

Petitioner Delp raised the bankruptcy issues at trial and won a judgment, with favorable findings and conclusions on all those points. App 36-39 (judgment ¶¶ 3.b-h); App 44-75 (findings ¶¶ 1-5, 9-11, 13-14, 35-36, 38-39; conclusions ¶¶ 2-14, 38, 40-47, 49-60, 78, 80-82, 90, 92, 94-95, 98, 100-104). At the bench trial, the case was largely governed by Amended Joint Stipulations of Facts ("Stip's"). App 77*ff*. Respondent Nu-Way appealed to the Waco court. In his responsive briefs, Delp again raised the bankruptcy issues. *See* Amended Brief of Appellee (App 84*ff*) (at pre-Pg 13 [issues 2, 3], 9-24, 28-35, 45-50); Appellee's Supplemental Sur-Reply Brief (App 131*ff*) (at pre-Pg 8 [issues 3, 8, 9], 1-11, 18-21, 24-25); and Appellee's Second Supplemental Sur-Reply Brief (App 151*ff*) (at pre-Pg 4 [issues 1, 2, 3, 5, 6, 7], 1-14). Despite the clear propriety of the trial court judgment on *all* issues, the Waco court reversed. App 1-32. Delp's petition for review (discretionary) and motion for hearing to the Texas Supreme Court were denied. App 32-33.

This case is about an overreaching Creditor relentlessly pursuing a former business partner, seeking to collect against even an asset not only properly exempted in a bankruptcy case, but which the Creditor, John Harvison (principal and privy of Nu-Way), *explicitly* allowed the Debtor to "retain" in Creditor's own Chapter 11 Plan. Nu-Way justifies this by claiming Petitioner

Delp committed a Prohibited Transaction with his IRA under IRC (26 U.S.C.) § 4975(c), in that Delp's guarantee was retired in the exchange. Finding ¶ 16 (App 46); Stip ¶ 19 (App 81). The Waco court agreed. App 20-23. But before that event, the IRA was already exempted by being scheduled in Delp's Chapter 11 case. App 184-185; Stip ¶ 21 (App 81). Therefore, Delp was not constrained in his use of the IRA thereafter. Beyond that, in the Creditor's confirmed Plan, *post*-transaction, Creditor allowed Delp to "retain" that IRA. App 197.

Delp and Harvison were officers of Nu-Way entities, jointly owning a number of companies. Stip ¶¶ 2, 3 (App 78-79); finding ¶ 6 (App 44). After a falling out, Delp ended by being required to file Chapter 11. Finding ¶ 3 (App 44). His Schedule C listed the IRA. App 185. No one objected. Stip ¶ 6 (App 79). Harvison/Nu-Way filed proofs of claim. *Id.* ¶ 8; App 79. *Post*-petition, Delp IRA made the questioned security interest purchase with "assets held in Delp IRA when Delp filed his . . . Chapter 11 bankruptcy case." Stip ¶ 22 (App 81). Harvison then dominated Delp's Chapter 11, filing a Plan with terms highly favorable to himself and his "Related Entities," which included Nu-Way. App 192-201; Stip ¶ 10 (App 79). It was confirmed. ("Order Confirming Plan"–App 202-203) after a cramdown hearing. Stip ¶¶ 11, 12 (App 80). The key term is Plan provision ¶ 4.10:

> Class 10 consists of the interest of the Debtor and the Debtor's spouse . . .. The Debtor and the Debtor's spouse shall be entitled to *retain* . . . their personal property *scheduled* as exempt under Schedule C . . .. The Debtor and the Debtor's spouse shall retain no non-exempt assets.

App 197 (emphasis added). Thus, Harvison took everything of Delp's, with the *only*, but *express*, exception of whatever it was that Delp had scheduled in his Schedule C, *i.e.*, his IRA. Harvison and Nu-Way are privies. Findings ¶¶ 7-8, 26-32, 35-36 (App 45, 47-49); conclusions ¶¶ 25-35 (App 56-57); *cf.* App at 223.

Years after the Plan was confirmed, Nu-Way obtained a default Judgment Determining Debt to be Nondischargeable in an amount of $2+ million for corporate misconduct. App 209-211; Stip ¶ 23 (App 82). "Nu-Way's Judgment *claims* arose before Delp's Chapter 11 Bankruptcy filing." Conclusion ¶ 2; App 51. On the heels of yet another case in which a Harvison company had sued Delp (*Economy* Judgment, App 218-221; Mandamus proceeding, App 222-229 [Economy and Nu-Way acknowledged to be "virtually the same corporation," App 223]; finding ¶ 26, App 47-48), Nu-Way instituted both the turnover case and garnishment cases below (which were subsequently consolidated), giving rise to the trial judgment. App 47-48, 223. Finding the IRA held proceeds of bankruptcy-exempt property; or, property Nu-Way allowed Delp to "retain" in the confirmed Harvison Plan, the trial court held the IRA was exempt from Nu-Way's collection efforts under *res judicata*, contract, and other theories. Judgment ¶ 3.b-e; Conclusions ¶¶ 13, 14, 37-57 (App 36-37; 53, 57-62).

The Waco court reversed. It dispensed with Delp's *res judicata* argument because "[t]here is nothing in the record to indicate that Nu-Way 'had actual or imputed awareness' before the confirmation hearing that Delp had caused funds to be withdrawn from his IRA for the acquisition of the secured claim." App 9. No stipulation, finding, or conclusion in the trial court supports this "finding," nor any law this "conclusion."

The trial court awarded fees to counsel, App 37-39 (sub-¶¶ f-h), but in conclusion ¶¶ 96-98 (App 71-72) contingently "direct[ed] that the fee be paid to Delp with instructions to replenish the IRA for the funds taken from the IRA to sustain this defensive litigation." *Id.* ¶ 97 (App 72). The court of appeals did not discuss this. However, Chief Justice Gray, concurring in the judgment, stated: "[T]he payments were made to an attorney for the express purpose of defending and protecting the IRA's exempt status. Payment of attorney's fees out of the IRA for the defense of the IRA is entirely appropriate." App 30. The court of appeals' fee holding should also be reversed as to both award *and* offset.

ARGUMENT

A. NONDISCHARGEABILITY OF A BANKRUPTCY DEBT DOES NOT DEFEAT A BANKRUPTCY CODE § 523(c) PROPERTY EXEMPTION.

This case's undisputed facts squarely present "narrow statutory issue[s]" of bankruptcy law, which affect at least thousands of Americans. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 237 (1989). "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *Id.* at 241 (citation omitted). *Accord, Arlington Central School District Board of Education v. Murphy*, - U.S. -; 126 S. Ct. 2455, 2459 (2006); *Arthur Anderson LLP v. United States*, 544 U.S. 696, 705 (2005).

"[F]ederal bankruptcy law, not state law, governs the distribution of a bankrupt debtor's assets to his creditors." *American Surety Co. of New York v. Sampsell*, 327 U.S. 269, 272 (1946). Specifically, the Bankruptcy Code (11 U.S.C.) § 522(c) provides that "property exempted under this section [§ 522] is not liable during *or after* the case for any debt of the debtor that arose . . . before the commencement of the case, except–" (emphasis added). None of the exceptions are applicable. This language is quite clear. As applied, it means that *property Delp listed in his Schedule C as exempt is not liable to collection by Nu-Way on its prepetition debt.* App 185; Stip. ¶ 6 (App 79). There was never any objection to Delp's listing of his IRA therein, *id.*, so it was thereby made exempt. *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). The trial court was thus correct in holding § 522 barred Nu-Way's attempt to collect its nondischargeable, but prepetition, debt against Delp's Schedule C-exempt IRA. App 35-39 (judgment ¶ 3); App 59 (conclusion ¶ 42) ("exemption was effected by a lack of objection to the Debtor's Schedule 'C'").

The Waco Court says all § 522 accomplishes is to take property listed in Schedule C *out of the estate*. App 18. But in light of subsection (c), the language of sub-(b)(1), that "an individual debtor may exempt from property of the estate," must mean that the exemption may be had of any property that is in the estate under Bankruptcy Code § 541(a)(1) ("all legal or equitable interests of the debtor as of the commencement of the case"). 11 U.S.C. § 541(a)(1). In other words, 11 U.S.C. § 522(b)(1) & (c) together mean, plainly, that (a) a debtor may claim an exemption out of any of the property in which the debtor has a legal or equitable interest as of the commencement of the case, and (b) the effect, if he takes such an exemption, is that such property "is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case" (with inapplicable exceptions). If an alternative reading is possible, *arguendo*, it would be that sub-(c) gives the debtor an *added benefit* to sub-(b)(1)'s taking the property out of the estate; *i.e.*, that the property *further* cannot be held liable for any pre-petition debt.

This Court followed the plain language of the Bankruptcy Code and Rules despite lower court determinations to the contrary in *Taylor*. *See* 503 U.S. at 643-45. And in *Travelers Casualty and Surety Co. v. Pacific Gas & Electric Co.*, - U.S. - ; 127 S.Ct. 1199, 1206 (2007), the Court held: "The absence of textual support is fatal . . .." *Id.* The Court should so hold here as well.

The law distinguishes between (a) a debtor escaping a claim, and (b) allowing him to retain certain properties against *all* claims. *E.g.*: "the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral." *United States v. Security Industrial Bank*, 459 U.S. 70, 75 (1982) (citations omitted). *Cf.* Blackmun, J., concurring, at 84 ("the exemptions in question are limited as to *kinds of property* . . .; the exemption provisions in question affect the *remedy* and not the *debt*") (emphasis added). Exemptions are supposed to leave the debtor "a minimum for necessities." *Id.* App 67 ¶ 80.

The Waco Court correctly holds that if the property loses its exemption *subsequently*, then at that point a *post*-petition creditor can seize that property. App 20. However, it is difficult to see how a subsequent change in the *property* has a capacity to transform a prepetition *claim* into a *post*-petition one.[1] Section 522(c) says it applies to "*any* debt of the debtor that arose . . . before the commencement of the case" (emphasis added). It then lists *certain* claims that are not covered by that exemption, but Nu-Way's is not among them.[2] By the principle of *expressio unius est exclusio alterius*, the statutory list in § 522(c) of instances in which claims may still be made against a debtor's subsection (*l*) listed *properties* excludes any others.[3]

Thus, the Court may begin and end "with the text and structure" of the provision. *Alexander v. Sandoval*, 532 U.S. 275, 288-89 & n. 7 (2001). *See Travelers supra*. Nu-Way's debt arose

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1 *Contra* Waco court: "[A] prepetition creditor holding a nondischargeable judgment lien has the same right to attach non-exempt assets acquired by a debtor after discharge as a postpetition creditor." 205 S.W.3d at 681 (citations omitted).

2 Nu-Way made a string-cite of every imaginable type of wrongdoing against Delp, as falling under 11 U.S.C. § 523(a) (4) & (6), in its Second Amended Complaint to Determine Dischargeability of Debt. App 203*ff*. By default, it had those incorporated into the Findings of Fact and Conclusions of Law Relating to Default Judgment, App 211*ff*. But all the acts were against *Nu-Way*, *id*., not any entity listed under § 522(c)(3). *No finding, conclusion, or exhibit in either case shows applicability of a § 522(c) exception. Accord*, Waco court, App 16-17.

3 "'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Mills v. United States*, 278 U.S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim–*expressio unius est exclusio alterius*. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action *only under very limited circumstances*, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act." *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974) (latter emphasis added). *Followed, Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 94 n.30 (1981).

prior to Delp's Chapter 11; Nu-Way's claim is not within the subsection (c) exceptions; therefore, Nu-Way may not collect its debt against property listed under subsection (*l*); *i.e.*, Delp's IRA.

"'The majority of courts . . . hold that a postpetition change in the character of property properly claimed as exempt will *not* change the status of that property, relying on the principle that once property is exempt, it is exempt forever and nothing occurring postpetition can change that fact.' . . . Exempt property is not liable for prepetition debt . . .." *In re Martin*, 269 B.R. 119, 122-23 (Bkrtcy. M.D. Pa. 2001) *citing Lowe v. Reed (In re Reed)*, 184 B.R. 733 (Bkrtcy. W.D. Tex. 1995) (emphasis added; further citations omitted). While the property may lose its exempt status as to *post*-petition creditors due to post-petition conduct, under subsection (c) it does *not* do so for *pre*petition creditors, such as Nu-Way. The fact that Nu-Way's claim is nondischargeable is irrelevant *unless it falls in one of the (c) exceptions*. It does not.

Albeit in an unpublished decision, the conclusion to this exact effect in *Rice v. Parks*[4] is unarguable:

> [P]ursuant to § 522(c), creditors' rights to collect those nondischargeable prepetition debts are subordinate to the debtor's rights in property exempted in the bankruptcy case. . . . "The judgment holders are free to obtain a postpetition execution against the debtor's non-exempt . . . property. However, they are not free to issue execution on the exempted property. They will, therefore, have to wait for the debtor to acquire additional property to satisfy their claim."

Id. at 9-11 (emphasis added). *See also id.* at 26 ("under the

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4 *Rice v. Parks*, No. 1:98CV00731; 1999 U.S. Dist. LEXIS 21229 (M.D.N.C. Nov. 9, 1999) *aff'd w/o opin.*, 243 F.3d 539 (4th Cir. 2001).

mandate of § 522(c) that property is not available to . . . the holder of a prepetition debt, albeit a nondischargeable debt"). This is precisely correct. Delp asks this Court to adopt this reasoning.

Therefore, the Waco court's judgment violates Delp's rights under 11 U.S.C. § 522(c). The petition should be granted, and the Waco Court reversed.

B. PARTICIPATION IN A CHAPTER 11 BANKRUPTCY CASE BINDS ANY CREDITOR TO THE PLAN, THOUGH ITS DEBT LATER BE DECLARED NONDISCHARGEABLE.

In ¶ 4.10, *Harvison*'s Plan provided that Delp may "retain . . . personal property listed as exempt under Schedule C . . .."[5]

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5 App 197. Harvison may attempt to argue that there is an *ambiguity* in the provision because the following sentence says, "The Debtor . . . shall retain no non-exempt assets . . .." *Id.* The effect of a confirmed plan is controlled by federal law because the "right created by federal law is an essential element of the . . . action." *MCI Telecommunications Corp. v. Garden State Investment Corp.*, 981 F.2d 385, 387 (8th Cir. 1992) (citing this Court's precedents). Specifics control over general. *Cf. Young v. Community Nutrition Institute*, 476 U.S. 974, 983-84 (1986) ("specific exception to . . . general definition"). In any event, Texas common law is to the same effect: "The rule is that a specific provision will control over a general. The specific stipulation of the definite date must control the general terminology 'or thereafter until written notice of termination is given.'" *Friedlander v. Christianson*, 320 S.W.2d 404, 408 (Tex. Civ. App.–Houston 1959, no writ).

It is evident that the second clause is intended simply to say Delp cannot keep *anything else* other than what is listed in Schedule C *unless* everyone else is paid in full, including interest. Any other interpretation would render the first clause's specificity of "scheduled as exempt under Schedule C" superfluous. *Cf. Young, supra* (Court's reading would not render provision superfluous). Again, Texas common law is the same. *R.H. Sanders Corp. v. Haves*, 541 S.W.2d 262, 265 (Tex. Civ. App.–Dallas 1976, no writ) ("contract clauses should not be construed so as to render them superfluous"). Or, Harvison meant Delp could keep only those assets *just declared* to be "exempt" under the Plan's *prior sentence*; *i.e.*, the assets *scheduled* as exempt were *by definition* the exempt ones.

The Plan was confirmed by cramdown. Stip ¶¶ 10-12. App 79-80.

Nu-Way extensively participated in Delp's Chapter 11 case, receiving benefits under the Plan it would not have been entitled to by virtue of its nondischargeability. Proofs of claim, App 185-192; Plan ¶¶ 1.02, 1.20, 1.25, 1.26, 1.27, 2.09, 4.08, 4.09, 4.10 (includes rights to all **Mrs.** Delp's nonexempt properties), **5.03** ("Liquidating Trustee . . . shall sell, settle or compromise all litigation claims against John Harvison, the Related Entities [includes Nu-Way] and any and all other litigation claims of the Debtor, within ninety (90) days from the Effective Date."), 5.04 & 6.01. App 193-200. Under ¶ 9.03: "Upon . . . entry of the Order Confirming Harvison's Plan, the provisions of Harvison's Plan shall bind the Debtor and *any* Creditor . . .." App 201; App 193.

Nu-Way's claim is impaired. (Plan ¶ 4.09; App 197.) *See* 11 U.S.C. § 1124(1). Therefore, *some* right of its *was diminished*. That was the right to collect against Delp's IRA.

Were there ambiguity, Harvison, Delp's arch rival, drafted the Plan. So it must be construed against him (Nu-Way's privy). Findings ¶¶ 8, 10, 11. App 45. "Moreover, respondents cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it. . . . Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995) (citations omitted). *Accord, Duzich v. Marine Office of America Corp.*, 980 S.W.2d 857, 866 (Tex. App.–Corpus Christi 1998, pet. denied) ("canon of construing ambiguities in contracts against the drafter"). Nu-Way has never contested that ¶ 4.10 says Delp can retain the IRA. Only, it claims that because its debt is nondischargeable, it is not *bound* by that. In any event, the trial court held that the Plan was unambiguous; and, regardless, should be construed against Nu-Way. Conclusions ¶¶ 46-49; App 59-60. Therefore, the trial court's conclusion must stand: "Nu-Way agreed, per the Plan, Delp would be entitled to 'retain' the IRA from collection efforts on creditor claims such as what Nu-Way advanced in Delp's bankruptcy and obtained Judgment on (the Judgment Nu-Way now seeks to collect on in this case)." Conclusion ¶ 6; App 52. The only question is the effect of the nondischargeabilty, *infra*.

Also, as part of Harvison's own Associated Group and Related Entities (¶¶ 1.02, 1.26, 2.09, 4.09, 5.03; App 193-198), Nu-Way *accepted* the Plan under 11 U.S.C. § 1126(a). *Cf. Prudence Realization Corp. v. Ferris*, 323 U.S. 650, 654 (1945) (per Frankfurter, J.) (noting "acquiescence by the petitioner in the closing order"). The only issue is whether Nu-Way is *bound* by Plan ¶ 4.10. It is. In fact, it so agreed in Plan ¶ 9.03 (App 201) (Plan binds "*any* Creditor") (emphasis added).

11 U.S.C. § 1141(a) says, with the exceptions of (d)(2) and (d)(3), "the provisions of a confirmed plan bind the debtor . . . and *any* creditor" (emphasis added). Again, Nu-Way also *explicitly* so agreed. Plan ¶ 9.03; App 201. The statute does not limit its scope to *discharged* creditors. The exceptions in Sub-§§ (d)(2) & (3) do not override Nu-Way's concession in Plan ¶ 4.10 that Delp can "retain" his IRA, as being listed in his Schedule C. The only effect of those subdivisions is that Delp is not *discharged* either as to nondischargeable debts, or if the Plan is a liquidation plan (*see* Plan Article V; App 197-199; *see also* App at 213 ¶ 5). They say *nothing* about what *properties* the debtor may "retain." Instead, as discussed, the Code says exempt *property* is *not* thereafter liable for *this type of debt*. Argument A *supra*. Therefore, reading each term of the Code in tandem, consistently, and without rendering any superfluous,[6] the plan *may* provide for the debtor to retain certain *property*, and this Plan clearly does.

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6 "Now, it is the duty of Courts of Justice so to construe all statutes as to give full effect to all the words, if this can be properly done; and thus to preserve the harmony of all the provisions." *Bend v. Hoyt*, 38 U.S. 263, 272 (1839). "But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by reference to each other; and if possible, every clause and provision shall avail, and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together." *Peck v. Jenness*, 48 U.S. (7 How) 612, 623 (1827). *See also United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 477 (1827).

"Although a plan cannot discharge the debt, it may otherwise subject the debt to its provisions. . . . 'Stated another way, § 1141(d)(2) preserves the right of a creditor holding a nondischargeable debt to full payment. It does not provide that the provisions of a confirmed plan cannot affect the rights of such a creditor . . ..'" *United States v. Martin (In re Martin)*, 150 B.R. 43, 46 (Bkrtcy. S.D. Cal. 1993), *appeal dismissed as moot*, 172 B.R. 644 (S.D. Cal. 1994) (citations omitted). A creditor cannot participate in a case and agree to a plan, then ignore it. *Id.*

Other courts have also held that a plan may modify even a nondischargeable creditor's *rights*, but not limit full *payment*:

> The issue is whether Jokay may be enjoined by the terms of the Plan from executing on any nondischargeable judgment it might obtain outside the parameters of the Plan. . . .
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> Section 1141(d)(2) excludes from discharge "any debt" excepted from discharge under § 523. Under § 101(11) of the Bankruptcy Code, "debt" is defined as a liability on a claim. Section 101(4) defines "claim" to mean a right to payment. Section 1141(d)(2), therefore, excepts from discharge the right to payment on a liability that is found to be nondischargeable under § 523. Stated another way, § 1141(d)(2) preserves the right of a creditor holding a nondischargeable debt to full payment. It does not provide that the provisions of a confirmed plan cannot affect the rights of such creditor or that, as the bankruptcy court in *In re Howell*, 84 Bankr. 834 (Bankr. M.D. Fla. 1988) stated, " . . . [A] creditor who has a debt excepted from discharge under section 523 cannot be bound by the provisions of a confirmed plan." *Id.* at 836. Frankly, I disagree with the *Howell* court's approach of broadly applying

> § 1141(d)(2). An expansive interpretation is inconsistent with the statutory language and imposes unwarranted limitations on debtors seeking to reorganize under Chapter 11. I also suggest that such an approach is inconsistent with the views of the Supreme Court as expressed in *United States v. Energy Resources Co., Inc.*, 495 U.S. 545 (1990).

In re Mercado, 124 B.R. 799, 801-02 (Bkrtcy. C.D. Cal. 1991).

Delp agrees with *Mercado* that this Court's *Energy Resources* case presages the result here. *Energy Resources* holds that "a bankruptcy court has the authority to order the IRS to apply the payments to trust fund liabilities if the bankruptcy court determines that this designation is necessary to the success of a reorganization plan." 495 U.S. at 549. This is "consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *Id.* This was true even though "those tax debts [were] nondischargeable." *Id.*

The instant proceeding is only distinct from *Energy Resources* in this respect: The bankruptcy court there approved the plan's limitation *over the nondischargeable creditor's objection*. Whereas, here, *the creditor itself drafted and obtained confirmation of the plan*. *See Prudence*, *supra*, 323 U.S. at 654 (noting "acquiescence by the petitioner in the closing order [which] give[s] ground for believing that the arrangement was the product of bargaining between the parties"). Therefore, there is no reason why the Plan's limitation that Nu-Way could collect against Delp on any and all property *except* that scheduled as exempt (the IRA) should not be enforced.[7]

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7 In fact, Harvison/Nu-Way obtained a Plan term *contrary to law* as well–access to *Mrs.* Delp's property. *In re Nahat*, 278 B.R. 108 (Bkrtcy. N.D. Tex. 2002).

Moreover, lower courtshave held that confirmed plan provisions govern *even if violatve of the Code*. "If a creditor fails to protect its interests by timelyobjecting to a plan . . ., 'it cannot later complain about a certain povision contained in a confirmed plan, even if such a provision isinconsistent with the Code.' . . . This court has recognized the finality of confirmation orders even if the confirmed plan contains ilegal provisions." *Great Lakes Higher Education Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083, 1086 (9th Cir. 1999), *aff'g* 218 B.R. 916 (BAP 9th Cir. 1998).[8] *See also Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1051 (5th Cir. 1987) (release of guarantor); *Inre McAfee*, 120 B.R. 76 (Bkrtcy. N.D. Tex. 1990) (even though confirmation of a plan is not supposed to release liability on a guaranty, the plan stated it would, and the plan prevailed over the Code). *Accord, Geary v. Texas Commerce Bank, N.A.*, 967 S.W.2d 836, 838 (*Tex.* 1998) (per curiam) (relying on Fifth Circuit authorities).

Nu-Way says it did notknow to object to its own Plan because it was unaware of the Prohibited Transaction. The trial court made no such "ignorance' fact finding. The *appeals court* imports that "finding" without any prerogative to do so. 205 S.W.3d at 675.[9] Even so, Nu-Way cannot thus obviate the Plan:

> The court cannot allowthe facts of a particular case, however appealing, to sway it from the path along which the law directs it. . . . [T]he court holds that all preconfirmation claims of AUIC [*et al.*] . . . are discharged except to the extent to which the plan provides. . . . Appellant emphasizes these harshfacts. 'We agree that this is a hard case, but we cannot agree that it should

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8 The existence of contrary authorities is another reason to grant the Petition.

9 The Waco court put the burden on *Help* to prove Nu-Way *did* have such knowledge. But *Nu-Way* had to show why Nu-Way was *not* bound. *Sweeney v. Taco Bell, Inc.*, 824 S.W.2d 289, 292 (Tex. App.--Fort Worth 1992, writ denied).

> be allowed to make bad law.' *FCC v. Woko, Inc.*, 329 U.S. 223, 229 (1946). . . . Despite the *misleading actions* . . . of debtor Alton, the time specifications set out in the Bankruptcy Code are sufficiently clear to have placed an obligation on creditor Byrd to follow the case and to take the timely action necessary to pursue his claim."

Christopher v. American Universal Insurance Group, Inc. (In re Christopher), 148 B.R. 832, 838 & n.12 (Bkrtcy. N.D. Tex. 1992) (some citations omitted). Certainly Nu-Way never tried to prove nor obtained any fact finding of *fraudulent inducement* by *Delp* of the *Harvison* Plan, confirmed by *cramdown*. Stip ¶ 12; App 80.

Nu-Way *could* have protected itself by saying Delp could keep the IRA *subject to* rights of a nondischargeable creditor *to the property* (not just its "claims," Plan ¶ 9.01; App 200) . Or, it could have *omitted* "scheduled as exempt under Schedule C," just saying Delp could "retain no non-exempt assets." ¶ 4.10, *supra*. (*See* n.5 at 13-14 *supra* as to construction of the actual clauses.) Instead, *Nu-Way itself* chose to adopt the language that Delp could retain whatever was listed in Schedule C. It cannot now be heard to gainsay that concession simply because it has an effect it did not anticipate, and does not now want to comply with.[10]

Therefore, the confirmed Chapter 11 Plan–*Harvison's* Plan, allowed Delp to retain his IRA, as listed in his Schedule C.

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10 "'Quasi estoppel' forbids a party from accepting benefits of a transaction . . . and then subsequently taking an inconsistent position to avoid the corresponding . . . effects. . . . That Mr. Davidson did not know he would go broke when he agreed to the divorce settlement is not an uncommon scenario, but [that is] no excuse for discharging [what] he chose to characterize as alimony." *In re Davidson*, 947 F.2d 1294, 1296-97 (5th Cir. 1991). "[A] creditor cannot both accept the benefits of a Settlement Agreement and thereafter object to the exemptions that the Settlement Agreement grants the debtor." *Rice* at 29. At the time of confirmation, Nu-Way *did not know* if its claim would be discharged. It may have thought the Plan deal was the best it would get. It took that chance.

There is no statutory bar to that concession. Even if there were, the Plan terms control. Creditors and debtors may have "their original rights modified by the terms of the reorganization plan. When they came before a [Texas] court seeking a determination of their present rights, that court was obliged to ascertain whether any rights had been fixed by the reorganization plan and, if so, to enforce them." *Prudence, supra*, 323 U.S. at 656 (per Frankfurter, J.). The trial court did this; the Waco court did not. The Petition should be granted, and the Waco court reversed, reinstating the trial court judgment.

C. THE CONFIRMATION ORDER PRECLUDES CREDITOR'S EFFORTS TO COLLECT AGAINST DEBTOR'S PLAN-EXEMPT ASSETS.

The Plan in its own right bars Nu-Way's position, without any statutory bar to its doing so. Further, the confirmation order itself operates as *res judicata* as to any issues about the IRA which Nu-Way could have raised at that time. "'It is clear that where the federal court decided a federal question, federal res judicata rules govern.'" *Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994) (citations omitted). "This Court has also required that effect be given in both state and federal courts to a plea of *res judicata* arising from decrees of a bankruptcy court." *Heiser v. Woodruff*, 327 U.S. 726 (1946) (citations omitted). *See also Geary* at 837 (*Tex.* 1998) ("Because the Incorsel bankruptcy was a federal proceeding, federal law controls whether res judicata will bar a later state court proceeding.") (citations omitted).

The *Geary* case, relying on the Fifth Circuit's *Shoaf* case, *supra*, is very analogous, holding a confirmation order precluded a later argument that the release of a *guarantor* was not binding:

> Based on *Shoaf*, we reject Texas Commerce's argument that a bankruptcy reorganization plan cannot discharge the debts of someone other than the bankrupt party. Texas

> Commerce did not appeal from the bankruptcy plan, choosing instead to attack it collaterally in this later suit. Even assuming that the bankruptcy court committed an error of law, Texas Commerce's sole remedy was by appeal and not by collateral attack. [Citations omitted.]
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> . . . The Incorsel reorganization plan is clear. It defines "Debts" as "any obligation of Debtor, alone, and any obligation of Debtor and any other Person, to any Entity." The plan then provides that "all Debts that arose before the Confirmation Date . . . are fully and finally satisfied by this Plan." The plan did not discharge debts in the ordinary meaning of that word, *it discharged them as defined in the plan.*
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> [We conclude that] *Shoaf* protects from collateral attack a bankruptcy order releasing a guarantor from liability . . ..

Geary at 838 (emphasis added).

This Court similarly applied *res judicata* in the face of a complaint of error in a bankruptcy court's confirmation order:

> To be sure, the Securities and Exchange Commission, as *amicus curiae*, suggests that the bankruptcy court was in error in failing to retain jurisdiction for determining this aspect of distribution. . . . In any event, since no appeal was taken, it is not now open to find error by the bankruptcy court in failing to retain jurisdiction. The order confirming the plan of reorganization is res judicata.

Prudence, *supra*, 323 U.S. at 654-55 (citation omitted).

Prudence and *Geary* could hardly have any greater application. Nu-Way, through its privy Harvison,[11] is barred by *res judicata* from any right against the IRA *property* that it agreed under its own Plan to let Delp "retain," upon entry of the confirmation order. This "is clear." *Geary, supra.* In fact, in this case failing to give *res judicata* effect to the plan confirmation order would operate to "undo the deal" as to what could be collected against because of the obvious "ground for believing that the arrangement was the product of bargaining between the parties." *Prudence* at 654. (*Cf.* App 213 ¶ 5, battle over the Plan between Harvison and Delp factions; conclusion 38, App 58.) It would be fundamentally unfair for Nu-Way (through principal and privy Harvison, in the same class under the Plan) to *explicitly provide* Delp could keep the assets he scheduled in his Schedule C *and only those assets*, Plan ¶ 4.10, App 197, yet *now* claim some right to *retract* that concession based on a nondischargeability position *it was already litigating at the time of the Plan propagation and confirmation.* App 212-213. Such a result is exactly contrary to Justice Frankfurter's teaching in *Prudence.*

Obviously, many other courts have held that confirmation orders operate as *res judicata* as to plan provisions in addition to *Prudence* and *Geary. See, e.g., First Union Commercial Corp. v. Nelson, Mullins, Riley and Scarborough (In re Varat Enterprises, Inc.)*, 81 F.3d 1310, 1317 (4th Cir. 1996) ("Once a plan is confirmed, *neither a debtor nor a creditor* can assert rights that are inconsistent with its provisions.") (emphasis added; citation omitted); *Sosnowski v. Realtime Resolutions, Inc. (In re Sosnowski)*, 314 B.R. 23, 26-27 (Bkrtcy. D. Del. 2004) ("Absent timely appeal, the confirmed plan is *res judicata.*") *quoting* 5 *Collier on Bankruptcy*, P 1327.02[1] at 1327-3 (15th Rev. Ed. 2004); *In re Black*, No. 92-00165-PHC-JMM, Chapter 12; 1998

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11 *Cf. Geary* at 838 ("Federal res judicata law also bars subsequent claims by privies of the bankrupt party.") (citing Fifth Circuit). There is no reason a privy of the Plan *drafter* should be any *less* barred by the confirmation order *here* from making a collateral attack on the Plan under *res judicata* than the party in *Geary.*

Bankr. LEXIS 1665 at *41 (Bkrtcy. D. Az. Dec. 17, 1998) ("The IRS cannot assert rights that are inconsistent with the confirmed plan.") (emphasis added; citations omitted), *appeal denied*, Civil No. 99-0267-PHX-PGR; 2000 U.S. Dist. LEXIS 5880 at *21 (D. Az. March 30, 2000).[12]

This is true even if the Plan terms are *incorrect* or inconsistent with the Code. *Christopher*, *supra*, 148 B.R. at 837-38 (Bkrtcy. N.D. Tex. 1992) ("A strong policy favors enforcement of the plan of reorganization because too many rights of too many interests have relied on the finality of the confirmation order. All questions which *could have been* raised are foreclosed by res judicata.") (emphasis added); *Pardee*, *supra*, 193 F.3d at 1086 ("finality of confirmation orders even if the confirmed bankruptcy plan contains *illegal* provisions") (emphasis added; citation omitted); *Shoaf*, *supra*; *Geary*, *supra*; *McAfee*, *supra*. Therefore, Nu-Way cannot avoid the *res judicata* effect of the Plan's allowing Delp to retain his IRA as to "any Creditor," Plan ¶ 9.03; App 201.[13] Unless, if at all *arguendo*, it is based on Nu-Way's purported ignorance of Delp's Prohibited Transaction.[14]

Nu-Way's defense to *res judicata* based on no notice of the Prohibited Transaction fails in three ways. One, it is

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12 *And see Browning v. Levy*, 283 F.3d 761, 779 (6th Cir. 2002) ("ESOP's failure to raise its claims against SSD in the bankruptcy court has a res judicata effect with respect to those claims. *In re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458, 463 (6th Cir. 1991) (holding that the confirmation of a plan of reorganization constitutes a final judgment in a bankruptcy proceeding with regard to claims that *could have been heard* in the proceeding).") (emphasis added). (*See also Browning* discussion *infra* as to "fraudulent concealment.")

13 "[A] claim must be raised in a prior bankruptcy proceeding if it is 'related to' the proceeding, meaning that it would have affected the debtor's rights or liabilities." *Browning* at 778. Obviously Nu-Way's claim that Delp could not keep the IRA if there were a Prohibited Transaction preceding confirmation fits in this category.

14 *But see supra* at 18 & n.9 as to the "no evidence" "finding" on this point.

irrelevant. The Plan says, "*scheduled* as exempt." Therefore, whether or not it *remained* exempt under *tax* or Texas *State law* on exemptions between the Petition date and confirmation had *nothing to do* with whether Delp could keep the IRA. "[F]ederal bankruptcy law, not state law, governs the distribution of a bankrupt's assets to his creditors." *American Surety v. Sampsell*, *supra*, 327 U.S. at 272 (citations omitted). *Whatever* Harvison/Nu-Way consented to allow Delp to retain in the Plan was what he *could* retain, and any exemption or lack thereof under Texas State law is simply neither here nor there. Because Nu-Way chose to base Delp's right to retain his IRA on whether he *scheduled* it, Delp was not obliged to advise of *subsequent* events.

Second, the "wrongful concealment" required to prevent *res judicata* from applying to a cause of action is analogous to the doctrine of "fraudulent concealment" for limitations purposes. *Browning* at 770. "[T]o invoke the doctrine of fraudulent concealment, 'affirmative concealment must be shown; mere silence or unwillingness to divulge wrongful activities is not sufficient.' . . . 'Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.'" *Id.* (emph. added; cites omitted).

Fraudulent concealment is an affirmative defense and must be both pled and supported by factual evidence to be sustained. *KPMG Peat Marwick v. Harrison County Housing Finance Corp.*, 988 S.W.2d 746, 749 (Tex. 1999). In the same vein, under the Texas discovery rule defense to a statute of limitations, the plaintiff has the burden to plead, prove, and obtain findings to support that "plea in confession and avoidance." *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515 (Tex. 1988). Nu-Way simply did not meet its burden in the trial court to plead, prove up, and obtain findings that Delp did anything more than *be silent*–not "volunteering" that the FFRE transaction which Nu-Way now claims was "Prohibited" took place. App 58, ¶ 38. *See Schlumberger Technology v. Swanson*, 959 S.W.2d 171 (Tex. 1997) (parties resolving fractured relations cannot rely on silence).

Third, Nu-Way *could have* found out about the Prohibited Transaction *before* the confirmation hearing *in exactly the same way* it says it learned of it *afterwards–discovery* addressed to that issue. *See* Waco opinion, 205 S.W.3d at 675; App 8-9. Nu-Way was *already suing* Delp for nondischargeability for nefariousness in how he acted toward Harvison companies. App 188-191, 204, 212. Further, Nu-Way, through Harvison, authored the Plan. Therefore, it was well aware that the Schedule C property, most prominently the IRA, was all it was willing to let Delp retain. *Cf. FDIC v. Shearson-American Express, Inc.*, 996 F.2d 493, 498-99 (1st Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994) ("Prudential was fully cognizant that the bankruptcy court intended to take action in June on the question of disposal of Serrano's assets ....").

There is absolutely no reason Nu-Way could not have scheduled a Rule 2004 examination up until a few days *before* the confirmation hearing. If the continued "exemption" of the Delp IRA under *tax* or *State* exemption law was as critical to the IRA's exemption under the *Plan* as Nu-Way now makes out, why wait until *after confirmation* to try to find out about that?

In *Heiser v. Woodruff*, 327 U.S. 726 (1946), this Court held that "[i]n general a judgment is *res judicata* not only as to all matters litigated and decided by it, but as to all relevant issues which *could* have been but were *not* raised and litigated in the suit." *Id.* at 735 (emphasis added; citations omitted). Therefore, the mere fact Nu-Way did not raise or litigate the IRA-exemption issue pre-confirmation obviously does not impact the *res judicata* effect of the Plan confirmation order. *Contra* Waco court, App 9; 205 S.W.3d at 675. Only if Nu-Way *could* not have raised the loss of exemption issue before the confirmation hearing might it avoid the *res judicata* impact of that order. Nu-Way demonstrated it *was* capable of finding out about the transfer *through discovery*, App 9. The transfer *preceded* the confirmation hearing, App 81, Stip ¶¶ 18-22. There is no basis for the Waco court's conclusion that Nu-Way could not have raised the effect of the transfer on the exemption under the Plan pre-confirmation. App 8-9.

Again, the more likely situation is that Nu-Way did not previously investigate the State-law exempt status of the IRA pre-confirmation because *that had nothing to do with whether Delp could retain the IRA*. It has already been shown that Delp could keep the IRA simply because he *did* list it in his Schedule C and there was no timely objection. Argument A, *supra*. In any event, the *potential* for that result obviously would have been a basis for Nu-Way to simply allow Delp to keep the IRA without any further contest of the matter in its proposed Plan. Therefore, it is mere hindsight strategy, prevented by quasi-estoppel, for Nu-Way to now protest that it would not have let Delp keep the IRA had it only known of the transaction previously. This was not the issue. And if it was, Nu-Way had just as much a capacity to address the issue pre-confirmation as after. Therefore, Nu-Way is barred by *res judicata* and waiver from now arguing that the transaction prevented the plan-confirmation order's accomplishment of Delp's retention of his IRA from Nu-Way's collection efforts.

Even more saliently, however, Nu-Way *already had* the ground of possible nondischargeability of its debt as a predicate to argue Delp could not keep the IRA *when it proposed Delp could keep the IRA*. It could very easily have provided that Delp's *keeping the IRA* should be *contingent* on the outcome of its nondischargeability case. *Cf. Prudence*, *supra*, 323 U.S. at 654-55 (bankruptcy court could have, and possibly should have, retained jurisdiction "for determining this aspect of distribution," but it did not, and that was *res judicata* against the subsequent parity argument). The trial court correctly held that *res judicata* (as well as waiver and release) barred Nu-Way's current efforts to have the IRA turned over to satisfy Nu-Way's nondischargeable prepetition debt. The Waco court erred in reversing on these points.

D. THE FEE AWARD SHOULD NOT BE OFFSET AGAINST THE CREDITOR'S BANKRUPTCY JUDGMENT.

The final issue relates to the relief awarded by the trial

court for Nu-Way's violation of the § 522(c) exemption, the Plan, and the confirmation order in pursuing collection against the IRA on Nu-Way's prepetition debt or claim. Not finding any such violation, the Waco court held no fee or damages relief was available. App 24-25. 205 S.W.3d at 683. In fact, that court then compounded the error by holding that even if the fee award to Delp could be justified under the Texas Declaratory Judgment Act, it must be offset against Nu-Way's nondischargeable judgment. App 26. *Id.* at 684. Both these holdings are wrong.

Obviously, if this Court agrees with Delp on his foregoing points, then Nu-Way did, in fact, and as found by the trial court, violate § 522(c), the Plan, and the confirmation order. Therefore, the issue is, what remedy does Delp have for those infractions?

As this Court held in *Travelers, supra*, the Bankruptcy Code allows for attorneys' fees to be recovered under State law when "the fees at issue were incurred litigating issues of bankruptcy law." 127 S.Ct. at 1204. As interpreted, this includes fees the *debtor* may be entitled to. *Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai)*, BAP No. HI-06-1328-KMoB; 2007 Bankr. LEXIS 1217 at 14 (BAP 9th Cir. March 28, 2007). Without doubt, Delp is entitled to his reasonable and necessary fees incurred in proving up Nu-Way's breach of the Plan contract. Texas Civil Practice & Remedies Code § 38.001.[15]

Likewise, as the Waco court itself concurred, the Texas Declaratory Judgment Act gave the trial court discretion to award Delp his fees. Texas Civil Practice & Remedies Code § 37.009;

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15 The "reorganization plan functions as a contract in its own right." *U.S. Brass Corp. v. Travelers Insurance Group, Inc. (In re U.S. Brass Corp.)*, 301 F.3d 296, 307 (5th Cir. 2002); *In re Varat, supra*, 81 F.3d at 1317; *Pam Capital Funding, L.P. v. New NGC, Inc. (In re Kevco, Inc.)*, 309 B.R. 458, 463 (Bkrtcy. N.D. Tex. Fort Worth Div. 2004), (*citing Brass, inter alia*) (also finding federal bankruptcy jurisdiction where "the debtor was relying on its interpretation of the language of the plan," *id.* at 465).

App 25. 205 S.W.3d at 684. The trial court granted Delp fees alternatively under both rubrics. Judgment ¶ 3.f-h; App 37-39.[16]

However, the Waco court then said the trial court had no option but to hold these fees would be offset against Nu-Way's judgment. App 26. 205 S.W.3d at 684. This is erroneous. Bankruptcy law is implicated on the issue of offset, so federal law governs. That is, the effect of violation of a bankruptcy provision or a confirmed plan is controlled by federal law because the "right created by federal law is an essential element of the . . . action." *MCI, supra*, 981 F.2d at 387 (8th Cir. 1992) (citing this Court's precedents). *See also American Surety v. Sampsell, supra*, 327 U.S. at 272 ("But the extent to which state law is to be so considered is in the last analysis a matter of federal law."). Under bankruptcy law, it is "evident that Congress did not intend for debtors to pay a portion of the attorney's fees out of their exempt property." *In re Harrington*, 306 B.R. 172, 185 (Bkrtcy. E.D. Tex. 2003) (citations omitted).[17]

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16 As noted in the Statement of the Case, *supra* at 8, the Waco court only addressed availability of fees directly to counsel; whereas, the trial court alternatively held Delp could recover them to reimburse the IRA. App 71-72.

17 *See* award of attorneys' fees in *Holden v. United States (In re Holden)*, 236 B.R. 156, 166-67 (Bkrtcy. D. Vt. 1999) (creditors "may not take actions to collect debts that are inconsistent with the method of payment provided for in the plan") (citation omitted), *aff'd*, 258 B.R. 323 (D. Vt. 2000); *Kimco Leasing, Inc. v. Knee*, 144 B.R. 1001, 1010 (N.D. Ill. 1992) (bankruptcy court listed avenues the creditor was free to have pursued, but nonetheless awarded sanctions with fees based on creditor taking a step which was *not* permitted). *Cf. Watkins v. Guardian Loan Co. of Massapequa, Inc.*, 240 B.R. 668 (Bkrtcy. E.D.N.Y. 1999), allowing attorneys' fees for the clear violation of bankruptcy law: "[T]he situation at bar is analogous to a creditor's willful violation of the automatic stay." *Id.* at 679. The court cited this Court's exceptions to the "American Rule" that parties bear their own fees in the absence of contract or statute "(1) when a defendant willfully disobeys a court order and (2) when a losing party acts in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 678 (emph. added). *See Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

Based on this bankruptcy law and policy, the trial court (a) expressly found Delp had to invade the IRA corpus (that being all Nu-Way allowed him to retain in the first place), to protect the exemption of the IRA from Nu-Way and prove Nu-Way's breach and violations; and (b) therefore allowed Delp to replenish the IRA with the fee award as part and parcel of prevailing on the bankruptcy issues–*i.e.*, that Nu-Way could not collect its bankruptcy judgment against that IRA. Conclusions ¶¶ 96-102; App 71-73. To have permitted offset under such circumstances would have been "utterly inequitable." *Id.*, ¶ 96; App 71.

Even under *Texas* law, a party cannot be permitted to profit or benefit from his own wrong.[18] Nu-Way's Plan provided Delp could keep Delp IRA; *i.e.*, remain free from being taken to satisfy Nu-Way's prepetition claim. Yet, Nu-Way filed *two suits* to capture Delp IRA. App 223. The result–Delp was *depleted of the asset Delp was supposed to "retain,"* spent on attorneys' fees incurred so Delp *could* retain it. The harder Delp had to fight to retain Delp IRA, the more he was depleted of it. This justifies the trial court's denying offset based on not being allowed to profit from one's wrong. Certainly this was within the trial court's discretion in making a declaratory award of fees, considering the bankruptcy implications of the subject matter of the case.

Delp did not institute a suit *to recover on a claim of his own. Nu-Way* instituted this suit to deprive Delp of what Nu-Way had already consented Delp could retain. Delp had no option but to incur fees (short of total capitulation). Thus, he had to invade the IRA corpus to do so. Nu-Way must now be required to refund what it depleted, without offset, as the trial court correctly held. "Payment of attorney's fees out of the IRA for the defense of the IRA exempt status is entirely appropriate." Chief Justice Gray, concurring in the judgment. App. 30-31. 205 S.W.3d at 686.

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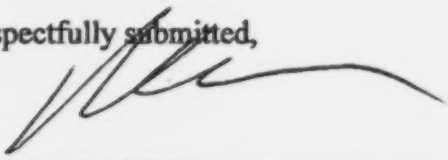
18 *Kothman v. Boley*, 158 Tex. 56, 60; 308 S.W.2d 1, 4 (1957); *Muller v. Leyendecker*, 697 S.W.2d 668, 673 (Tex. App.–San Antonio 1985, no writ); *Ragland v. Ragland*, 43 S.W.2d 758, 759 (Tex. App.–Waco 1987, no writ).

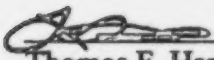
CONCLUSION

The Waco judgment violates Delp's bankruptcy law rights. Important federal issues are present, warranting this Court's review, in light of its prior precedent. Given the high frequency of bankruptcies and the lower courts being split, this is an ideal case for the Court to enunciate the law on these federal statutory and bankruptcy-plan exemption issues. A clearer and more appropriate (undisputed) factual context for application of such rulings could hardly be presented. Certainly the equities of the matter warrant this Court's consideration of these issues in this case in particular. The Court should grant this Petition, issue a Writ of Certiorari to the Waco court, reverse it, and reinstate the trial court judgment.

Respectfully submitted,



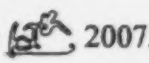
Mack Ed Swindle
Counsel of Record



Thomas F. Harkins, Jr.

**WHITAKER CHALK,
SWINDLE & SAWYER, L.L.P.**

3500 D.R. Horton Tower
301 Commerce Street
Fort Worth, Texas 76102-4186
Phone: (817) 878-0500

Dated: September  , 2007.

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